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No. 91-471

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNER OF THE STATE OF ALABAMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a disposal tax that applies only to wastes generated outside the State violates the Commerce Clause.

2. Whether a disposal tax that applies only to waste disposed of at "commercial" hazardous waste disposal facilities violates the Commerce Clause.

3. Whether a limitation on the amount of hazardous waste that may be disposed of annually at such facilities violates the Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner owns and operates the Emelle Facility, a hazardous waste treatment and disposal landfill in western Alabama. In 1987, the United States Environmental Protection Agency issued a permit for the Emelle Facility under the provisions of the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (RCRA). Under that Act the EPA Administrator is charged with "establishing such performance standards as may be necessary to protect human health and the environment." 42 U.S.C.

6924(a). Permits may be issued upon a determination of compliance with those standards. 42 U.S.C. 6925(c).

RCRA, however, is an exercise in cooperative federalism. States may be authorized to administer and enforce an equivalent hazardous waste program in lieu of the federal program. 42 U.S.C. 6926. In addition, "[n]othing in [RCRA] shall be construed to prohibit any State from imposing any requirements which are more stringent than those imposed by [federal] regulations." 42 U.S.C. 6929. Alabama, in fact, has a permitting requirement applicable to the Emelle Facility pursuant to Ala. Code § 22-30-12.

In the late 1980's, Alabama and its officials became alarmed about the large volume of hazardous wastes, principally from outside Alabama, brought to the Emelle Facility for disposal. The Emelle facility receives a considerable portion of all hazardous waste which is generated and landfilled in the United States. The overwhelming majority of hazardous waste received at Emelle comes from outside the State of Alabama. The State's response to these circumstances principally has been to erect barriers to the interstate component of the waste disposal activities at Emelle. First, in 1988, state officials sued the Environmental Protection Agency to restrain shipments of PCB-contaminated dirt from a Texas Superfund site to the Emelle Facility. See *Alabama* v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 493 U.S. 991 (1989). Alabama obtained preliminary and permanent injunctive relief from the United States District Court for the Middle District of Alabama; on appeal, the Eleventh Circuit reversed, dissolved the injunction and dismissed the case for lack of subject matter jurisdiction. 871 F.2d at 1560. The delay in effectuating the Superfund remedy cost the government hundreds of thousands of dollars. See generally *Alabama ex rel. Siegelman* v. *EPA*, 925 F.2d 385 (11th Cir. 1991).

In the summer of 1989, the Alabama legislature and executive agencies took further steps to restrain petitioner's interstate trade at Emelle. The legislature enacted the Holley Bill, Ala. Code § 22-30-11 (Supp. 1989), which prohibited facilities in Alabama from accepting wastes generated in other States where the generating State either prohibits the treatment or disposal of hazardous wastes, or has no existing facility for the treatment or disposal of hazardous wastes and has not entered into an agreement with Alabama. On its effective date, the Holley Bill prevented the Emelle facility from accepting wastes generated in 22 States and the District of Columbia. The Alabama Department of Environmental Management also promulgated two sets of regulations in 1989. One set required the State's approval before wastes could be shipped to Emelle; the other set required certain types of hazardous wastes to be treated prior to disposal in a landfill.

Petitioner challenged the Holley Bill and both sets of regulations in a suit alleging violation of the Commerce Clause and the Supremacy Clause. The United States District Court for the Northern District of Alabama upheld the challenged law and regulations in early 1990. *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Envtl. Management*, 729 F. Supp. 792. The Eleventh Circuit reversed in part and held that the Holley Bill violated the inherent prohibitions of the Commerce Clause because it "plainly distinguishes among wastes based on their origin, with no other basis for the distinction." *National Solid Waste Ass'n* v. *Alabama Dep't of Envtl. Management*, 910 F.2d 713, 720, amended, 924 F.2d 1001 (1991), cert. denied, 111 S. Ct. 2800 (1991). In particular, the Eleventh Circuit found that the State's interest in ensuring adequate capacity for Alabama-generated wastes and the dangers of transportation of hazardous wastes did not justify the

State's differential treatment of out-of-state wastes. 910 F.2d at 720.

In 1990, the Alabama legislature enacted Act No. 90-326, which represents the third attempt in as many years to curtail petitioner's interstate commerce in hazardous wastes. Three parts of Act No. 90-326 are at issue here. First, Section 22-30B-23(b) imposes "an additional fee levied at the rate of [$]72.00 per ton" for "waste and substances which are generated outside of Alabama and disposed of at a commercial site in Alabama." Pet. App. 106a (the Additional Fee). Second, Section 22-30B-23(a) levies "a fee to be paid by the operators of each commercial site for the disposal of hazardous waste in the amount of [$]25.60 per ton." Pet. App. 106a. (the Base Fee). Finally, the Act restricts the amount of hazardous wastes that may be disposed of at any commercial site during any twelve-month period after October 1, 1991, to the amount that was disposed of during the period July 15, 1990 to July 14, 1991. *Id.* at 112a (the Cap Provision). The Act was to become effective on July 15, 1990. *Id.* at 113a.

Petitioner commenced this action in Alabama circuit court challenging Act No. 90-326 on federal and state constitutional grounds. After a trial, the circuit court found that the $72 Additional Fee is unconstitutional as a violation of the Commerce Clause (Pet. App. 85a). It found that hazardous wastes are an article of interstate commerce and that the Additional Fee facially discriminates against such commerce. *Ibid.* The trial court also concluded that the State had failed to meet the heavy burden of demonstrating that the discriminatory legislation advances a legitimate state purpose that cannot be adequately served by non-discriminatory alternatives. *Id.* at 85a-86a. The court found that legitimate state concerns about the dangerousness of hazardous waste and the desire to minimize the generation of such wastes could more directly be met by non-

discriminatory measures; there was no demonstration that the Additional Fee could be deemed a compensatory tax to equalize the burden on in-state and out-of-state generators; and the State's interest in forcing other States to develop waste disposal capacity does not justify discriminatory legislation. *Id.* at 86a-88a & n.6.

On the other hand, the circuit court upheld both the Base Fee and the Cap Provision of Act 90-326. The court ruled that because those provisions do not facially discriminate against interstate commerce, the balancing test set forth in *Pike* v. *Bruce Church Inc.*, 397 U.S. 137 (1970), should be used to assess their validity. Pet. App. 66a, 72a. Applying that test, the court concluded that the local benefits of the Base Fee's compensation for the financial risks to the State for hazardous waste disposal activities and its deterrence to landfilling hazardous wastes are not clearly outweighed by the impact on interstate commerce. *Id.* at 67a. Similarly, the Cap Provision was held to be supported by legitimate local interests in conserving the State's natural resources and protecting its citizens' health and safety that are not clearly outweighed by the impact on interstate commerce. *Id.* at 72a-73a. The court nevertheless noted (*id.* at 73a, 92a-93a) that the invalidity of the Additional Fee might require modification of the Cap Provision to reflect a base period unaffected by unconstitutional discrimination.

Both petitioner and the respondents appealed to the Alabama Supreme Court. That court upheld the circuit court's rulings on the Base Fee and Cap Provision on the basis of the lower court's opinion. Pet. App. 17a-37a. It reversed the circuit court's ruling that the Additional Fee is unconstitutional as a violation of the Commerce Clause. The state supreme court found that the Additional Fee serves legitimate local purposes that can not adequately be served by

nondiscriminatory alternatives -- specifically (*id.* at 44a):

> (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

The court noted that hazardous wastes are permanently buried at Emelle and stated that "nothing in the Commerce Clause compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states" (*id.* at 45a). It concluded that a non-discriminatory tax on both Alabama and out-of-state generated waste is not an available alternative "because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country" (*id.* at 46a).

Justice Houston concurred. He reasoned that hazardous waste is not an article of commerce protected under the Commerce Clause of the Constitution, observing that the contrary conclusion of the Eleventh Circuit is not binding on the state supreme court (Pet. App. 48a).

DISCUSSION

The Supreme Court of Alabama and the United States Court of Appeals for the Eleventh Circuit have come to opposite conclusions concerning restrictions by the State of Alabama on interstate commerce in hazardous waste disposal. The state court has ruled in this case that the disproportionate role played by

the Emelle Facility in the national waste disposal effort is a legitimate state concern that justifies discriminatory burdens placed on disposal of wastes generated in other States. The Eleventh Circuit has ruled that such concerns do not authorize the State of Alabama to enact legislation that discriminates on the basis of the State of origin of the waste. In light of the Emelle Facility's role in the national waste disposal effort, this conflict concerning the law governing that facility, by itself, merits resolution by this Court.

More broadly, however, the struggle between petitioner and the State of Alabama does not stand alone on the legal landscape. Disposal of waste -- whether solid, hazardous, or nuclear -- has become an extremely controversial and divisive issue across the Nation. Many state and local governmental units have sought to relieve pressure generated by local constituencies by enacting legislation that discriminates against wastes generated out-of-state. Until the present case, in the absence of authorizing federal legislation,[1] those legislative efforts have regularly been struck down under authority of this Court's decision in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). The Supreme Court of Alabama, however, found that case inapplicable in the context of hazardous waste disposal. This Court's precedent is likely to encourage similar efforts by

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[1] See, *e.g.*, the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, discussed in the government's brief in opposition in *State of New York* v. *United States*, *County of Allegheny* v. *United States*, and *County of Cortland* v. *United States*, Nos. 91-543, 91-558, and 91-563.

other States.[2] Review by this Court is, in our judgment, therefore is warranted.

1. The State of Alabama plainly has legitimate and well-founded concerns about the disposal of hazardous wastes at the Emelle Facility. The health, safety and welfare of its citizens in the area of the facility, the safety of travelers on the roads leading to the facility, and the future condition of the natural resources and the environment of the State are all potentially implicated by the disposal of hazardous wastes. That being so, the State of Alabama enjoys a large measure of legislative and regulatory authority over the Emelle Facility under its traditional police powers.

The Alabama Supreme Court relied upon many of these concerns as the basis for upholding the Additional Fee enactment in this case (Pet. App. 44a). But because these legitimate state concerns can effectively be served by non-discriminatory enactments, we are unpersuaded that under this Court's jurisprudence they justify the Additional Fee requirement's discriminatory treatment of wastes generated out-of-state.

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[2] In *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781, 792 (1991), the Fourth Circuit recently summarized the dangers inherent in such a proliferation of restrictive state laws:

> [T]he effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. [B]etter that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

In addition, the Alabama Supreme Court justified the discriminatory nature of the Additional Fee as a legitimate attempt to force

> the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama.

Pet. App. 44a. A tax or fee imposed upon the disposal of hazardous waste that is designed to compensate the State for the expenses of regulating, monitoring and dealing with the adverse effects of that activity clearly serves a legitimate state purpose. But a fee that discriminates against waste generated out-of-state is not necessary or appropriate for this purpose. Indeed, if a disproportionate portion of the hazardous waste disposed of in Alabama is generated out-of-state, then that same portion of a non-discriminatory tax on waste disposal would obviously be borne by generators in other States.

Alabama could properly impose a compensatory tax on interstate commerce in hazardous waste "that equalizes previously unequal tax burdens by offsetting 'a specific tax imposed only on intrastate commerce for a substantially equivalent event.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 287 (1987); accord, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981). But the circuit court correctly found (Pet. App. 88a n.6) that the State had not adequately demonstrated that the Additional Fee served as a compensatory tax for other taxes borne by in-state generators (*ibid.*). The Alabama Supreme Court did not disturb this finding, and respondents do not contend in this Court that the Additional Fee can be justified as a traditional compensatory tax.

Nor does the State's unquestioned power to protect its environment against the risk of degradation, recognized in *Maine* v. *Taylor*, 477 U.S. 131 (1986),

justify the discriminatory Additional Fee. *Maine* v. *Taylor* upheld the State's ban on the importation of live bait fish; the dispositive fact in that case was that the out-of-state bait fish contained a parasite that the local fish did not, and thus posed a new risk. Alabama has not established that the out-of-state waste disposed of at Emelle is significantly different from such waste generated in Alabama.[3]

Respondents assert (Hunt Br. in Opp. 12-13)[4] that the discriminatory fee is warranted by the risk that, if the State is ultimately required to bear the costs of cleaning up the Emelle Facility, it will be unable to obtain any meaningful contribution from the out-of-state generators. But federal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste -- both in-state and out-of-state. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, generally subjects petitioner, as owner and operator of the facility, and the generators of the waste to strict, joint and several liability for "all costs of removal or remedial action incurred by a State." 42 U.S.C. 9607(a)(1) and (3)(A). See, *e.g.*, *O'Neil* v. *Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). Furthermore, it is far from certain that any particular in-state generator, currently exempted from the Additional Fee, will be in existence or located in Alabama when and if clean-up of Emelle is eventually

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[3] Far from casting doubt on the continuing vitality of *City of Philadelphia*, *Maine* v. *Taylor* cites and quotes that decision with approval several times. See 477 U.S. at 148-149 & n. 19, 152.

[4] "Hunt Br. in Opp." refers to the brief in opposition filed by counsel of record Bert S. Nettles. "Sizemore Br. in Opp." refers to the brief in opposition filed by counsel of record William Coleman.

required.[5] Accordingly, respondents' asserted justification for the Additional Fee's disparate treatment of out-of-state generators based on the risk of ultimate state liability is highly speculative. Such speculative concerns do not support that Fee under this Court's precedents. To be sure, those concerns may properly be presented to Congress as a basis for urging enactment of federal legislation specifically authorizing States within which major hazardous waste disposal facilities are located to adopt designated limitations on interstate waste shipments.[6] See Sizemore Br. in Opp. 7-8 (national waste disposal problems involve "policy issues in need of a comprehensive legislative solution by Congress"). But Congress has not acted in this respect. Absent such federal legislation, this Court's decisions make clear that the State is precluded by the Commerce Clause from granting Alabama's businesses preferential access to the Emelle Facility and imposing upon out-of-

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[5] In any event, any risks of ultimate state liability for the Emelle Facility that do exist are borne by the State and its taxpayers as a whole rather than the in-state generators of hazardous waste favored by the Additional Fee provision.

[6] For example, Congress might consider the enactment of federal statutory provisions similar to those contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, discussed in the government's brief in opposition in *State of New York* v. *United States*, *County of Allegheny* v. *United States*, and *County of Cortland* v. *United States*, Nos. 91-543, 91-558, and 91-563. In fact, several bills contemplating limitations on, and the imposition of differential fees for, interstate waste disposal are currently pending before the House Committee on Energy and Commerce (*e.g.*, H.R. 739, 1525, 2380, 102d Cong., 1st Sess. (1991)) and the Senate Committee on Environment and Public Works (*e.g.*, S. 153, 174, 197, 241, 592, 102d Cong., 1st Sess. (1991)). Representatives of EPA have testified before these Committees regarding several of these bills, and the National Governor's Association has recently adopted a policy statement supporting congressional authorization of differential fees.

state generators a financial burden that the State is unwilling to place on its own citizens.[7] As in *City of Philadelphia* v. *New Jersey*, 437 U.S. at 627, the State is pursuing entirely legitimate goals by means forbidden by this Court's precedents interpreting the Commerce Clause.

Several federal courts of appeals have found this Court's decision in *City of Philadelphia* v. *New Jersey*, *supra*, applicable to discriminatory state barriers to trade in hazardous waste disposal despite the obvious risks to the environment inherent in such substances. *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Envtl. Management*, 910 F.2d at 718-719; *Hardage* v. *Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978); cf. *Illinois* v. *General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982) (spent nuclear fuel) cert denied, 461 U.S. 913 (1983); *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (low level radioactive waste), cert. denied, 461 U.S. 913 (1983). See also *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781, 787 (4th Cir. 1991) (preliminary injunction upheld on Commerce Clause grounds).[8] The

[7] This Court has long recognized that the Commerce Clause imposes restraints on discrimination by one State against the products of another that are analogous to the express limitations of Art. I, § 10, Cl. 2 on the power of a State, without congressional consent, to impose imposts or duties on imports from or exports to foreign countries. See, *e.g.*, *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123, 136-140 (1869); *Coe* v. *Errol*, 116 U.S. 517, 526 (1886). The facially discriminatory tax imposed by the Additional Fee is the functional equivalent of a tariff at the State's border.

[8] Federal district courts, relying on *City of Philadelphia*, have also invalidated discriminatory disposal fees. See *National Solid Waste Management Ass'n* v. *Voinovich*, 763 F. Supp. 244, 262-263 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.); *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 753 F. Supp. 739, 769-770 (S.D. Ind. 1990).

attempt of the Supreme Court of Alabama to distinguish this Court's precedent in *City of Philadelphia* on the ground of the greater environmental risks associated with hazardous waste is accordingly unsupported by lower court precedent. Where, as here, a facility is duly licensed and permitted for treatment and disposal of wastes generated within the State, we believe that *City of Philadelphia's* rationale precludes discrimination against similar wastes generated in other States unless Congress authorizes such discrimination -- which it has not done. The Additional Fee therefore does not meet the governing legal standard, which is whether Alabama "has legitimate reasons, 'apart from their origin, to treat [out-of-state waste products] differently.'" *Maine* v. *Taylor*, 477 U.S. at 152, quoting *City of Philadelphia* v. *New Jersey*, 437 U.S. at 627. Accordingly, the decision below upholding the Additional Fee is out of step with this Court's holding in *City of Philadelphia* and post-*Philadelphia* lower court precedent.

2. The second question presented is whether imposition of a Base Fee of $25.60 per ton for substances consigned to a commercial hazardous waste disposal facility within the State violates the Commerce Clause despite its facial neutrality. Petitioner argues that the legislation categorizes waste disposal activities in a manner that subjects almost all waste generated outside the State to the Base Fee while practically exempting in-state generated waste. Pet. 18. This, together with the evidence of an express legislative purpose to discriminate against out-of-state generated waste, it argues, is sufficient to subject the Base Fee requirement to the strict scrutiny under the Commerce Clause applicable to facially discriminatory state actions. Pet. 18-21.

Respondents do not dispute that the Base Fee imposes a tax on interstate commercial activity. See Hunt Br. in Opp. 16; Sizemore Br. in Opp. 16-20. Instead, they contend that the Base Fee does not discriminate against interstate waste, but rather reflects a rational distinction between disposal of hazardous waste by landfill -- which occurs

almost exclusively at Emelle -- and the surface containment or treatment of waste water, which includes the bulk of the noncommercial disposal of hazardous waste generated within the State. Sizemore Br. in Opp. 18-19; Hunt Br. in Opp. 16-19. Respondents also assert that, because the Base Fee does not discriminate against interstate commerce on its face or in its effects, the Alabama courts correctly upheld it under the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). See Pet. App. 65a-67a; *id.* at 20a.

We submit that the Alabama courts erred in using the *Pike* balancing test -- which applies to disparate effects of *regulatory* measures -- to evaluate petitioner's challenge to the Base Fee as in effect a tax on the interstate disposal of hazardous waste. As this Court explained in *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981):

> The State's right to tax interstate commerce is limited, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.

Accord, *e.g.*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977); *Amerada Hess Corp.* v. *New Jersey Taxation Division*, 490 U.S. 66, 72 (1989).

The Base Fee clearly satisfies three of the four relevant factors. The first factor requires a threshold inquiry to ensure that the interstate activity has sufficient relationship to the State to justify the levying of a tax on it. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981). Here, the fact that the disposal activities subject to the tax take place within Alabama provides the necessary state relationship. The second factor, fair

apportionment, requires consideration when a number of States could tax the same activity, raising the problem of multiple taxation. See *Amerada Hess Corp.* v. *New Jersey Taxation Division*, 490 U.S. at 73. Since the taxable event here, the disposal of waste, occurs solely within the State of Alabama, a state tax on that disposal cannot give rise to multiple taxation problems and raises no apportionment questions. Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. at 617 (severance tax).

The fourth factor is also satisfied here; the Base Fee is fairly related to the services provided by Alabama. The "fair relation" factor does not require a closer fit between the services provided by the State and the revenue generated by the tax than that imposed by the Due Process Clause. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. at 622-623. It is sufficient if "the measure of the tax [is] reasonably related to the extent of the contact" (*id.* at 626, emphasis omitted). Accordingly, a tax measured by the tonnage of wastes disposed of within the State apparently satisfies the fourth factor.

The difficult question is whether, under this Court's taxation of interstate commerce jurisprudence, the Base Fee "discriminates against interstate commerce" (*Maryland* v. *Louisiana*, 451 U.S. at 754). The lower courts answered this question by first determining that the Base Fee did not facially discriminate against interstate commerce, and then holding that it satisfied the test of *Pike* v. *Bruce Church, Inc.*, *supra*. Pet. App. 20a; *id.* at 66a-67a. The first inquiry was plainly underinclusive, because this Court has consistently looked beyond facial non-discrimination in *tax* cases to evaluate the impact of the tax in practical effect and to evaluate the discriminatory purpose of a tax provision. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. at 756-757; *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984).

The second inquiry is irrelevant. This Court's precedents do not rely on the *Pike* test in *tax* cases. By its own terms, that test applies to state regulation, not taxation (see quotation, p. 14, *supra*). Moreover,

considering "putative local benefits" in evaluating a State's obvious interest in tax revenues would suggest that any state tax scheme would meet the *Pike* test. Indeed, in the present case, the trial court found (Pet. App. 67a) that "[t]he fee benefits the state by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities." In the tax context, the *Pike* test would be virtually no test at all.

But this Court's decisions make clear that the Commerce Clause ban on discriminatory state taxes is not so easily avoided. This Court has stated that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp.* v. *New Jersey Taxation Division*, 490 U.S. at 75. The Court has applied this test to strike down state taxes that include credits or offsets for in-state activities. *Maryland* v. *Louisiana*, 451 U.S. at 756-757; *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406-407 (1984). See also *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988). Even a facially neutral exemption from taxation is invalid if the exempted product or activity is likely to be a product of local business and a discriminatory purpose can be demonstrated. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. at 270; cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247 n.15 (1990).

The question presented by this case is nevertheless not the same as that in the exception, credit or offset cases. In the present case, the allegation is that when the legislature defined the taxable activity by limiting it to disposal at a "commercial site" (Pet. App. 105a), the state tax captured virtually all interstate commerce in hazardous waste and excluded almost all in-state generated waste. The lower courts found (Pet. App. 22a-24a; *id.* at 67a-71a) that commercial waste disposal differed sufficiently from the related non-commercial activity to permit the Base Fee to withstand an Equal Protection Clause challenge. It is, however, far from clear that that very permissive standard suffices in evaluating a dormant

Commerce Clause challenge to an allegedly discriminatory tax. This question was not considered below.

The factual context in which that question is presented in this case is also in dispute. The parties disagree in this Court about which in-state hazardous waste activities should be considered in evaluating the relative impact of the Base Fee on in-state and interstate commerce. The major dispute between the parties centers on how to characterize hazardous wastes undergoing treatment in surface impoundments. Such impoundments account for approximately two-thirds of in-state generated waste (see Pet. 5 n.2; Sizemore Br. in Opp. 3-4). The findings of fact in the lower courts do not directly address the status of these surface impoundments, although the issue was raised in petitioner's filings.[9]

The issue is not free from doubt. There are certainly differences between treatment of hazardous wastes in surface impoundments and disposal of hazardous wastes in landfills such as Emelle. As respondents observe (Sizemore Br. in Opp. 4), the hazardous wastes treated in surface impoundments are largely wastewater. On the other hand, the two types of treatment are in many respects similar. For example, surface impoundments are regulated under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, and are required to have groundwater monitoring wells to determine whether any hazardous wastes leaking from the impoundments have contaminated the underlying aquifer. 40 C.F.R. 265.90. Thus, to the extent that the Base Fee is designed to compensate the State for monitoring costs and potential costs of clean-up, those interests are to some degree

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[9] Petitioner's argument that the Base Fee is discriminatory in effect was based upon the figures on hazardous waste that are described in the petition (Pet. 5 n.2). Furthermore, petitioner specifically referred to impoundments as hazardous waste facilities equivalent to commercial waste disposal sites.

implicated by the exempted surface impoundments. The Alabama statute does not explicitly distinguish between the two types of treatments, and respondents do not identify any other materials indicating that Alabama in fact relied on this distinction in enacting the Base Fee provision.

In light of this unresolved dispute over the appropriate categorization of surface impoundments, we submit that it would be premature for this Court to undertake on this record to define a standard for determining when a state tax with a disparate impact on like-kind in-state and interstate commerce unlawfully discriminates against interstate commerce. If petitioner's categorization of hazardous waste activities were to be upheld by the lower courts, and its allegation sustained that the State had "gerrymandered" its definition of a taxable event so as to exclude 98 percent of in-state commerce while including virtually all interstate commerce, the Base Fee probably should be deemed to discriminate in effect against interstate commerce within the meaning of this Court's tax precedents. There would seem to be little analytical basis for distinguishing between tax schemes with exceptions, offsets or credits for in-state activities and those in which the definition of the taxable event has been artfully drawn in the first instance to exclude comparable in-state activities. On the other hand, if the courts below conclude that surface impoundments are not comparable to landfills, it will be necessary to consider the relevance of that distinction to the legislative decision to impose the base fee only on commercial facilities, whatever the nature of their disposal facilities, particularly given the evidence of a legislative intent to limit interstate shipments.

In any event, the Alabama Supreme Court used the wrong test, that of *Pike* v. *Bruce Church, Inc.*, *supra*, to evaluate the constitutional validity of the Base Fee under the Commerce Clause. Therefore, as to question two of the petition, this Court should grant, vacate and remand for further consideration, under appropriate legal standards, of the validity of the Base Fee.

3. The final provision of Act No. 90-326 challenged by the petitioner is the Cap Provision, which limits the amount of waste that may be disposed of in any 12-month period. We submit that, subject to the limitations of the Due Process, Takings, and Supremacy Clauses, States have authority to impose non-discriminatory limitations on the quantities of wastes to be disposed of within their borders. The Cap Provision of Act No. 90-326, however, presents two substantial issues. First, as the circuit court recognized (Pet. App. 73a, 92a-93a), the benchmark period for determining the waste volume under the Cap Provision was affected by the discriminatory Additional Fee. A complete remedy for the effects of the impermissible Additional Fee should accordingly include some adjustment of the Cap Provision. Second, the Cap Provision contains authority for the Governor to waive the volume limitation if "necessary to protect human health or the environment in the state" or if necessary to allow the State to comply with its obligations to assure disposal capacity. Pet. App. 113a. If this waiver provision allows a waiver to respond to a public health or environmental emergency only in Alabama, it raises a substantial issue under the Commerce Clause of underinclusion. Cf. *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d at 791 n.14 (questioning constitutionality of a requirement that a certificate of need to construct a new facility may not consider out-of-state need).[10]

For both of the above reasons, we submit that the third issue presented in the petition requires further

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[10] Respondents suggest that the Cap Provision also permits the State "to provide for disposal of out-of-state waste it guaranteed in the regional agreements required under [The Superfund Amendments and Reauthorization Act, 42 U.S.C. 9604(c)(9)]" (Hunt Br. in Opp. 22). The appropriate interpretation of this state statutory provision should be considered by the courts below in the first instance.

consideration by the courts below before it would be ripe for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. As to the first question presented, the Court may wish to consider summary reversal. As to the second and third questions presented, the judgment below should be vacated, and the case remanded for further consideration under the proper legal standards.

Respectfully submitted.

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